No. 02-575

Supreme Court, U.S.
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In The
Supreme Court of the United States

NIKE, INC., et al.,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of California

BRIEF OF *AMICI CURIAE* THE STATES OF CALIFORNIA, ALASKA, ARIZONA, CONNECTICUT, FLORIDA, ILLINOIS, LOUISIANA, MAINE, MARYLAND, MINNESOTA, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH DAKOTA, VERMONT, AND WEST VIRGINIA AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF RESPONDENT

BILL LOCKYER
Attorney General of California
MANUEL MEDEIROS
State Solicitor General
RICHARD M. FRANK
Chief Assistant Attorney General

HERSCHEL T. ELKINS
Senior Assistant Attorney General
RONALD A. REITER
Supervising Deputy Attorney General
(*Counsel of Record*)
State of California
455 Golden Gate Ave., 11th Floor
San Francisco, CA 94102
(415) 703-5511
(415) 703-5480 (Fax)

April 4, 2003

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

GREGG D. RENKES
Attorney General
State of Alaska

TERRY GODDARD
Attorney General
State of Arizona

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

CHARLES J. CRIST, JR.
Attorney General
State of Florida

LISA MADIGAN
Attorney General
State of Illinois

RICHARD IEYOUB
Attorney General
State of Louisiana

G. STEVEN ROWE
Attorney General
State of Maine

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

MIKE HATCH
Attorney General
State of Minnesota

PATRICIA A. MADRID
Attorney General
State of New Mexico

ELIOT SPITZER
Attorney General
State of New York

WAYNE STENEHJEM
Attorney General
State of North Dakota

JIM PETRO
Attorney General
State of Ohio

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

LAWRENCE E. LONG
Attorney General
State of South Dakota

WILLIAM H. SORRELL
Attorney General
State of Vermont

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia

ANABELLE RODRIGUEZ
Secretary of Justice
Commonwealth of Puerto Rico

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INTRODUCTION

Image advertising has become an essential marketing tool stimulating product purchase by associating, often with great subtlety, use of the product with consumer achievement of the lifestyle, values, or aspiration promoted. Plaintiff claims that Nike's well-cultivated image as a socially responsible company is instrumental to its successful product promotion. When sales were threatened by charges that Nike products were manufactured under execrable conditions in foreign sweatshops, Nike allegedly undertook a publicity campaign replete with false statements of fact about its own manufacturing operations to deceive the public about the true conditions under which its athletic footwear and apparel are produced in order to rehabilitate its image and foster product sales.

This case is before this Court on a review of the pleadings and is thus framed entirely by plaintiff's complaint. Since the material allegations of the complaint must be deemed true on demurrer (motion to dismiss), the California Supreme Court concluded that the complaint stated a cause of action under the state's false advertising law and alleged facts constituting false commercial speech that could be proscribed. *Kasky v. Nike, Inc.*, 45 P.3d 243, 262 (Cal. 2002). California's high court rejected Nike's effort – renewed in this Court and entirely unsupported by the record – to recast this matter as a debate of ideas and opinion about economic globalization: as framed by the pleadings, this case is only about Nike's ability to exploit false facts to promote commercial ends. Moreover, since false commercial speech may be prohibited, California may allow private party suits seeking limited equitable remedies on behalf of the general public to redress false advertising.

INTEREST OF *AMICI*

All states prohibit the dissemination of untrue statements to facilitate the sale of goods and services. With increasingly sophisticated modern marketing techniques, products and services are promoted not only by statements about price and performance but also by representations about the image of the product and the conduct of the manufacturer. The Court's opinion may substantially affect the application of the First Amendment to false advertising laws and, thus, may affect future law enforcement efforts. Moreover, challenges to state law that could have been, but were not, raised in the lower courts should not be vetted for the first time in this Court lest states be deprived of a full opportunity to defend their laws. Furthermore, California has a special interest in upholding its statute permitting private parties to seek limited equitable remedies on behalf of the general public to staunch the dissemination of false commercial speech.

SUMMARY OF ARGUMENT

The complaint alleges that Nike engaged in a publicity campaign asserting objectively verifiable false facts to mislead consumers about Nike's labor practices in order to assuage consumer concerns and promote the sale of Nike products. The material allegations of the complaint are deemed true on a review of the sufficiency of a pleading; there is no record other than the complaint. The California Supreme Court properly concluded that the complaint alleged false commercial speech that could be constitutionally redressed under state false advertising law. Furthermore, state procedure allowing private parties to seek limited discretionary equitable relief to remedy false commercial speech without proof of damages or actual malice does not impermissibly chill commercial speech,

and petitioner's contrary argument improperly raised for the first time in this Court should not be entertained.

ARGUMENT

I. NIKE'S FALSE STATEMENTS ABOUT ITS FOREIGN LABOR PRACTICES DISSEMINATED AS PART OF A PUBLICITY CAMPAIGN TO PROMOTE PRODUCT SALES IS FALSE COMMERCIAL SPEECH THAT MAY BE CONSTITUTIONALLY PROSCRIBED

A. The Complaint's False Advertising Allegations Are Deemed True On Review Of A Demurrer

This case is before the Court on the review of a demurrer. No evidence has been introduced, and no fact has been adjudicated. A demurrer, like a motion to dismiss under federal practice, tests whether a complaint articulates a cause of action. *See* Cal. Civ. Proc. Code § 430.10(e); Fed. R. Civ. P. 12(b)(6). In assessing the sufficiency of the complaint, the California Supreme Court was required to accept the truth of the complaint's allegations. *See Kasky*, 45 P.3d at 247. Similarly, this Court held that in reviewing a motion to dismiss under federal standards "'we must assume the truth of the material facts as alleged in the complaint.'" *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 633 (1999). The plaintiff's ability actually to prove its allegations is not at issue under either federal or state practice. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Committee on Children's Television, Inc. v. General Foods Corp.*, 673 P.2d 660, 670 (Cal. 1983).

Stripped to its essence, the lengthy complaint states that Nike purposefully made a series of *false* representations as part of its "advertising, promotional campaigns, public statements and marketing" efforts "in order to

maintain and/or increase its sales and profits." First Am. Compl. ("FAC"), ¶¶75, 79, 82(b), 84, Pet. Lodging at 30-31, 34-35. Plaintiff contends that Nike *falsely* stated that it (1) complies with applicable foreign wage and hour rules, (2) guarantees workers who are employed by foreign subcontracting manufacturers a "living wage," (3) pays workers in subcontracted factories double the minimum wage, (4) provides workers with free meals and health care, (5) complies with worker health and safety and environmental standards, and (6) protects workers from physical abuse by the subcontractors who own the factories. *Ibid.*

Plaintiff further alleges that Nike made the false representations of fact at issue "in response to the public exposure of Nike's labor practices in Southeast Asia" by human rights groups that harshly criticized the working conditions supposedly existing in the factories producing Nike's shoes and clothing. *Id.* ¶18, Pet. Lodging at 7-8. Nike's alleged false representations were purportedly designed to overcome what the complaint describes as a "sweatshop stigma" (*Id.*, Pet. Lodging at 7, l. 18 *et seq.*) to preserve both product and corporate image and thereby maintain and promote the desirability of the product and its sale the success of which had been adroitly nurtured through a $1 billion annual multi-year marketing effort. *Id.* ¶13, Pet. Lodging at 6.

Nike demurred to the complaint on First Amendment and state constitutional grounds. Nike's central contention was that it was drawn into a debate about globalization, economic policy, and labor standards and that its response to public attacks was absolutely protected. Plaintiff, however, argued that Nike made the allegedly false statements to fend off the call for a boycott and to preserve and, indeed, foster its reputation as a socially responsible company with which the public could deal without fear of promoting labor exploitation. Plaintiff, thus, argued that

Nike's statements were designed to promote sales and were a form of false commercial speech that receives no First Amendment protection.

B. Nike Has Manufactured An Image Of Social Responsibility As A Means Of Promoting Product Sales

1. Image Promotion Is An Essential Aspect Of Product Promotion

Modern marketing techniques may so inextricably link a product to an image that the promotion of the product's image or the image of the product's manufacturer is the promotion of the product:

> [T]he idea that brands can have a personality or image reflects the fact that people buy many products and services not only for what such products or services can do, but also for what they mean to the person or his or her reference group. In marketing terminology, products and services offer the user both functional and psychological benefits.

GRAHAME DOWLING, CREATING CORPORATE REPUTATIONS: IDENTITY, IMAGE, AND PERFORMANCE 17 (2001). Indeed, "[n]urturing, protecting, or exploiting a reputation . . . often determines whether a given company, product, or brand will succeed or fail." JOE MARCONI, REPUTATION MARKETING: BUILDING AND SUSTAINING YOUR ORGANIZATION'S GREATEST ASSET 2 (2002); *see* GRAHAME DOWLING, *supra*, at 10-11, 14, 16; S. HOWARD, CORPORATE IMAGE MANAGEMENT: A MARKETING DISCIPLINE FOR THE 21ST CENTURY 217 (1998). Accordingly, "[t]he best product advertising also sells the company as a good source for the product, and the best image advertising recognizes that the company itself is a 'product' over and above its subordinate products. . . . " A. Allen, *Corporate Advertising – Out*

of the Ivory Tower, Into Marketing, SOURCEBOOK ON CORPORATE IMAGE AND CORPORATE ADVOCACY ADVERTISING, 570 (Federal Trade Commission 1978).

Indeed, company image is important because it relates directly "to how comfortable customers feel about buying and using products." N. GREGORY, MARKETING CORPORATE IMAGE: THE COMPANY AS YOUR NUMBER ONE PRODUCT 96 (1991). In the 21st century marketplace,

> today's consumer is looking for the company that produces what they buy to provide more than a simple product. Increasingly they are looking behind the brand and the products to scrutinize the behaviour and reputation of the company that produces or sells them the item. In fact, in many cases the brand is becoming secondary to the company that makes it.

CHRIS GENASI, WINNING REPUTATION: HOW TO BE YOUR OWN SPIN DOCTOR 38 (2002).

Companies now operate in a "business climate influenced by major societal themes," one of which involves adherence to "global responsibility standards." Jim Kartalia, *Reputation At Risk?*, 47 RISK MANAGEMENT NO. 7 (July 1, 2000), 2000 WL 8276979. If consumers believe that a company is not acting as a good corporate citizen, consumers will look to other product providers:

> The 'new consumer' is one who will, or will not, buy a product or service based on a company's reputation. A recent Walker Group study found that 48 percent of consumers refused to buy from companies whose business practices they found objectionable. Thus, as the pocketbook has become an all-powerful weapon, shaping positive perceptions is critical to maintaining a competitive edge. Criteria for judging corporations are based on broader measures than in the past. . . .

> [C]orporations are also being judged on their public responsibility behavior.

S. GARONE (ed.), *Designing A Consumer Awareness Campaign*, SHAPING A SUPERIOR CORPORATE IMAGE: A CONFERENCE REPORT 40 (Conf. Bd., Inc. 1996). Nike's alleged deceptive publicity campaign was designed to rehabilitate and enhance its image.

2. Nike Has Cultivated A Corporate Image Of Social Progressivity As A Marketing Tool To Promote Product Sales

Nike has made a celebrated effort to depict itself as a socially responsible company whose athletic shoes had a transformational quality enabling people to break out of the social roles consigned by age, race, and sex. These advertisements –

> conveyed the idea that Nike sneakers were worn by people of all ages, genders, and disabilities, and that the buyers of Nike shoes had the grit and determination to take on the type of challenges included in the advertisements. . . . 'the roads are always open. Just Do It.' Wearing Nikes offered a route to spiritual if not political salvation.

RANDY SHAW, RECLAIMING AMERICA: NIKE, CLEAN AIR, AND THE NEW NATIONAL ACTIVISM 17 (1999); *see* MARCONI, *supra*, at p. 58 ("Running shoes as a symbol of rebellion and individuality? Nike sold them that way – and at a premium price."). Nike's marketing, thus, suggests that buying Nike products is "part of expressing who you are, what you stand for and what you believe in." Steve Suo, *Nike Takes Own Advice In Changing Its Slogan*, PORTLAND OREGONIAN (January 4, 1998), 1998 WL 4171086.

If product success is predicated on emotional connections between the consumer and the company or product,

Nike's carefully engineered image of social progressivity – and the commercial success built on that image – could turn like the image of Dorian Gray if the company's professed commitment to social responsibility is untrue:

> the discovery that Nike might be associated with slavery and child labor seemed particularly disturbing because it so diverged from the image that most people have of Nike through its advertising. . . . Could the Nike we associate with the swoosh and its meanings of empowerment and the freedom to achieve, really be up to its ears in the sordid injustices it is accused of?

ROBERT GOLDMAN & STEPHEN PAPSON, NIKE CULTURE: THE SIGN OF THE SWOOSH 10 (1998). Consumers appear to be particularly sensitive to issues of labor and human rights abuses:

> in a Corporate Edge survey, 58% of the consumers polled said that they would boycott a brand if they knew that the company was employing children to make their product. A 1995 survey showed that 78% of their sample would patronize retail stores committed to stopping the abuse of garment workers. The same survey showed that 84% of the consumers sampled would pay $1 extra on a $20 purchase if the item was manufactured in a worker-friendly environment. Corporations have also recognized the materiality of human rights in the process of consumer decision making. For example, PepsiCo suffered for its operations in Myanmar when Harvard University reversed its plan to transfer $200,000 worth of cola purchases to Pepsi as a result of student concern over PepsiCo's contribution to human rights abuses in Myanmar. A spokesperson from Reebok openly stated that 'consumers today hold companies accountable for the way products are made, not just the quality of the product itself.'

Su-Ping Lu, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT'L L. 603, 624 (2000).

Nike incurred a consumer backlash when its foreign labor practices were equated with sweatshop working conditions: the company became the target of a call for a consumer boycott, the company suffered losses in 1998 for the first time in 13 years, and the entire imbroglio was viewed as a "PR disaster." *See* James Curtis, *Public Relations: PR Takes Center Stage,* CAMPAIGN (March 10, 2000), 2000 WL 9853049. Nike responded, in part, with the statements that are at issue in this appeal.

C. The First Amendment Does Not Protect A Company's False Statement Of Fact About Its Own Product Or Business Operations

1. The Commercial Speech Doctrine

In *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), this Court abandoned its long-standing categorical rejection of commercial speech from the ambit of First Amendment protection but recognized that "Some forms of commercial speech regulation are surely permissible." *Id.* at 770. The Court specifically acknowledged the right to prohibit false and misleading commercial speech. *Id.* at 771-72. In the Court's view, the truthfulness of commercial speech could be verified by its disseminator and its vital role in generating commercial profits made it a particularly hardy form of speech less likely to be chilled by proper regulation than other forms of speech. *Id.* at pp. 771-72 and n.24. The Court has never wavered in holding that "The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading. . . ." *Zauderer v. Office of Disciplinary Counsel* 471 U.S. 626, 638 (1985); *see, e.g., Thompson v. Western*

States Med. Cent., 122 S.Ct. 1497, 1504 (2002); *Central Hudson Gas & Electric Corp v. Public Service Com.*, 447 U.S. 557, 563 (1980); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977).

The "precise bounds of the category of expression that may be termed commercial speech" is subject to doubt. *Zauderer,* 471 U.S. at 637; *see, e.g., In re Primus*, 436 U.S. 412, 438 n.32 (1978) (line between commercial and non-commercial speech "will not always be easy to draw"). Moreover, "the diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). Indeed, the context in which particular speech is expressed may determine whether it has a commercial character. *See Zauderer*, 471 U.S. at 637 n.7 (discussion of injured person's legal rights may be protected speech in one context but commercial speech in the context of a lawyer's solicitation of business).

The most common description of commercial speech is speech that does "no more than propose a commercial transaction." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983). This Court has also referred to commercial speech as "expression solely related to the economic interests of the speaker and its audience." *Central Hudson,* 447 U.S. at 561.

Commercial promoters, however, cannot gain core First Amendment protection for commercial speech by conflating a commercial message with a discussion of public issues. This Court recognized that "many, if not most, products may be tied to public concerns about the environment, energy, economic policy, or individual health and safety" and that the linkage of commercial speech to matters of public debate does not elevate commercial speech to core First Amendment protection. *Central Hudson,* 447 U.S. at 562 n.5; *accord Zauderer*, 471 U.S.

637 n.7; *see National Commission on Egg Nutrition v. FTC,* 570 F.2d 157 (7th Cir. 1977), *cert. den.*, 439 U.S. 821 (1978) (trade association's statements minimizing health concerns about cholesterol and encouraging consumers to buy eggs were commercial speech promoting egg consumption merely disguised by the rhetoric of public health debate).

In *Bolger*, a manufacturer of condoms distributed pamphlets touting its products and discussing the general use of condoms in halting the spread of venereal disease. This Court noted that the pamphlets were advertisements, the pamphlets referred to specific products, and the distribution of the pamphlets was economically motivated. Each of these factors, standing alone, would not necessarily make the speech commercial in character, but the combination of these factors established that the speech was commercial notwithstanding the discussion of public health issues. *Bolger,* 463 U.S. at 66-68. The Court also noted, however, that these three factors need not all be present to find that speech was commercial in character. *Id.* at 67. The Court specifically expressed no opinion about whether reference to any particular product or service is a necessary element of commercial speech. *Id.* at 66, n.13, 67, n.14. The teaching of *Bolger* is that a statement directed to a commercial audience about a product to induce purchase has the hallmark of commercial speech.

In *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 474-75 (1989), this Court went further by indicating that the linkage between commercial speech and public issues would have to be inextricable to give the speech fully protected First Amendment status. The Court concluded that a promotion of Tupperware was commercial speech despite inclusion of a home economics discussion: "No law of man or of nature makes it impossible to sell

housewares without teaching home economics, or to teach home economics without selling housewares." *Id.* at 474.

The gist of the complaint in this action is that Nike made a series of false statements about its foreign labor practices as part of a publicity campaign to "entice consumers who do not want to purchase products made in sweatshop and/or unsafe and/or inhumane conditions" (FAC, ¶27, Pet. Lodging at 11) to purchase its products. *Id.* ¶¶75, 79, 82(b), and 84, Pet. Lodging at 31-32, 34-35. For example, Nike allegedly stated before Christmas:

> Consumers are savvy and want to know they support companies with good products and practices. . . . During the shopping season, we encourage shoppers to remember that NIKE is the industry's leader in improving factory conditions. Consider that Nike established the sporting goods industry's first code of conduct to ensure our workers know and can exercise their rights.

Id. ¶27, Pet. Lodging at 11. This statement is obviously an invitation to buy.

The alleged factual misrepresentations about Nike's own labor practices do not lose their character as commercial speech by being linked to a public debate. Nike can freely discuss economic globalization without reference to whether Nike itself employs underage workers or pays them twice the minimum wage. To paraphrase *Fox*, no law of man or nature requires Nike to discuss globalization by making specific objective factual claims about practices at its own particular factories.

2. The California Supreme Court Properly Applied Commercial Speech Doctrine

The California Supreme Court properly found that a seller may propose a commercial transaction with

statements about factors other than product characteristics; for example, a seller may focus on who, how, or where a product is made. Specific statutes have long prohibited misrepresentations about the circumstances or context of a product's manufacture or sale. For example, state law proscribes false or misleading statements regarding whether products were made by blind workers[1], American Indians[2], or union labor[3]. Neither the source, sponsorship of a product, nor the affiliation or certification of a seller may be misrepresented[4]. Special rules also govern untrue or misleading statements regarding how a product was produced, such as claims that a product was made or can be used or disposed in an environmentally sound manner[5]

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[1] *See, e.g.*, Ariz. Rev. Stat. Ann. § 41-1976 (2003); Cal. Bus. & Prof. Code § 17522 (West 2002); Fla. Stat. Ann. ch. 413.021 (2002); Md. Code Ann., Com. Law § 14-2802-2803 (2002); N.Y. Gen. Bus. Ann. § 396-f (2003); Ohio Rev. Code Ann. § 5109.17-5109.18 (2002); Va. Code Ann. § 51.5-102 (2003).

[2] *E.g.*, Cal. Bus. & Prof. Code, § 17569 (2002).

[3] *E.g.*, Cal. Lab. Code § 1011(a), 1012 (2002); *see also* Cal. Lab. Code § 1014; Fla. Stat. ch. 506.06 (2002); Or. Rev. Stat. § 661.210 (2001); E. H. SCHOPLER, *Rights in Union Label, Shop Card, or Other Insignia Denoting Union Shop or Workmanship*, 42 A.L.R.2d 709 (1955) (protection of label/mark signifying union labor).

[4] *See, e.g.*, Cal. Civ. Code §§ 1770(a)(2) and (3) (2002); D.C. Code § 28-3904(a)-(b) (2002); Fla. Stat. ch. 501.047(2) (2002); 815 Ill. Comp. Stat. Ann. 510/2(a)(2)-(3), (5) (2003); Md. Code Ann., Bus. Reg. § 1-404(a), (b)(1)-(2), (b)(i)-(iv) (2002); Miss. Code Ann. § 75-24-5(2)(b)-(c), (e) (2003); N.H. Rev. Stat. Ann. § 358-A:2(II)-(III), (V) (2002); Tex. Bus. & Com. Code Ann. § 17.46(b)(2)-(3), (5) (2003); Va. Code Ann. § 59.1-200(A)(2)-(3), (5) (2003); W.Va. Code Ann. § 46A-6-102(f)(2); 15 U.S.C.A. tit. § 1125(1)(A) (2003).

[5] *See, e.g.*, Cal. Bus. & Prof. Code § 17580.5 (West 1995); Fla. Stat. ch. 403.7193 (2002); Mich. Comp. Laws § 445.903(3)(1)(dd, ee) (2002); N.H. Rev. Stat. Ann. § 149-N:1 *et seq*. (2002); N.Y. Envtl. Conserv. Law § 27-0717 (McKinney 1997); 16 C.F.R. § 260.1 *et seq*. (2003) (FTC "Guides for the Use of Environmental Marketing Claims").

or that food is "organic"[6] or "dolphin safe."[7] Various laws ensure that where a product was produced is honestly stated.[8] Consumers may prefer to purchase products from companies that protect the environment, support the symphony or the local high school basketball team, avoid cruelty to animals in product testing, underwrite tutoring programs for inner-city youth, or finance cancer research. A false statement of fact that products were produced by disabled army veterans or were not produced by the forced labor of Chinese Christian religious dissidents may be more important to consumers than price or product quality in determining whether to purchase a product. Indeed, Nike's alleged misleading press releases and public letters about its labor practices were created directly to "advance an economic transaction" with consumers concerned about the labor conditions in overseas factories.

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[6] *See, e.g.*, 7 U.S.C. § 6501 *et seq.* (2003); Cal. Health & Safety Code § 110910 (West 1996 & Supp. 2002); Colo. Rev. Stat. § 35-11.5-101 *et seq.* (2002); Fla. Stat. ch. 504.23 *et seq.* (2002); Ga. Code Ann. § 2-21-4 (2002); Mich. Comp. Laws § 286.911 (2003); Tex. Agric. Code Ann. § 18.005 (Vernon's 2001); Va. Code Ann. § 3.1-385.2 (Michie 2002); Wash. Rev. Code § 15.86.030 (2003).

[7] 50 C.F.R. § 216.91.

[8] *See, e.g.*, Cal. Bus. & Prof. Code § 17533.7 (2002) ("Made in U.S.A.") and Civ. Code, § 1770(a)(4) (geographic origin); Colo. Rev. Stat. Ann. § 6-1-105(d) (2002); D.C. Code § 28-3904(t) (2002); Fla. Stat. ch. 501.97 (2002) (geographic origin); Fla. Stat. ch. 601.99 (2002) ("Florida citrus"); Ga. Code Ann. § 10-1-372(a)(4) (2003); Ga. Code Ann. § 10-1-393(b)(4)(A) (2003); Haw. Rev. Stat. Ann. § 481A-3(a)(4) (2002); Haw. Rev. Stat. § 486-120.6 (2002) ("All Hawaiian" coffee); Ill. Comp. Stat. Ann. § 510/2(a)(4) (2003); Md. Code Ann., Bus. Reg. § 1-404(c)(ii) (2002); Minn. Stat. Ann. § 325D.44(4) (2003); N.H. Rev. Stat. Ann. § 358-A:2(IV) (2002); Tex. Bus. & Com. Code Ann. § 17.46(b)(4) (2003); Utah Code § 13-11a-3(1)(d) (2002); Va. Code Ann. § 59.1-200(A)(4) (2003); W.Va Code Ann. § 46A-6-102(f)(4) (2002); Vt. Stat. tit. 6, § 490 *et seq.* (2002) ("Vermont maple syrup"); 15 U.S.C.A. tit. § 1125(1)(B) (2003).

No prior case has ever limited the commercial speech doctrine to speech involving only product characteristics, price, or availability. For example, statements about the education, experience, and qualifications of persons providing or endorsing services have been treated as commercial speech even when unaccompanied by a direct offer to provide services. *See Ibanez v. Florida Dept. of Bus. and Prof. Reg., Bd. of Accountancy*, 512 U.S. 136 (1994) (use of title "CPA"); *Peel v. Attorney Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990) (indication of board certification). Thus, this Court upheld a generic ban on the use of trade names by optometrists, which did not directly involve any misrepresentation concerning optometric services, because trade names could obscure the identity and qualifications of optometrists. *Friedman v. Rogers*, 440 U.S. 1 (1970); *see Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915 (7th Cir. 1984) (speech not involving product characteristics but aimed at maintaining advantageous foreign commercial relationships could be regulated as commercial speech).

The proposal of a commercial transaction, thus, may not only involve the offer of Product A at Price B but the offer of a product produced under circumstances, such as the conditions of manufacture, that transcend the particular physical characteristics of the product. Indeed, the Nike web site contains specific factual assertions about its contributions to the environment, the improvement of conditions for foreign workers, and the diversity of its domestic employees.[9]

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[9] The "corporate responsibility" category of Nike's web site affirmatively presents positions on environmental, worker diversity, and foreign manufacturing practice issues (<http://nikebiz.com> Mar. 18, 2003) such as "Nike's commitment is to provide workers making our

(Continued on following page)

The commercial harm involved in disseminating false statements about these matters to induce sales is that customers are led to patronize and support a business from which they might not otherwise buy and are diverted from dealing with honest enterprises whose conduct they support. It may be true that one can run just as fast with a Nike shoe manufactured by child labor or by physically abused Asian women as with a shoe manufactured under locally lawful labor conditions, but deceiving consumers through allegedly false statements of fact regarding the circumstances of manufacture deprives consumers of their ability to make choices in the marketplace.

Indeed, the socially conscious manufacture and sale of products may not only furnish the commercial lure of the product but may be a factor justifying a higher price because of the implicit increased cost of manufacturing and selling in a socially responsible way. The advertisement of false facts to inflate a corporate image may also mislead employees and investors who would not otherwise

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products with the best workplaces possible." <http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=compliance>. Nike discusses specific programs it sponsors to ameliorate working and living conditions in Third World countries, such as $1.3 million in grants for higher education programs <http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=communityprograms&subcat=education> and $1 million in loans to 5,300 Southeast Asian families, including 3,200 rural Vietnamese women and farm workers. <http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=communityprograms&subcat=smbizloans> Nike also presents specific information about employee salaries such as the fact that Indonesian entry level contract workers make at least 10-25% more in cash and allowances than local governments require. <http://swoosh.custhelp.com/cgi-bin/swoosh.cfg/php/enduser/std_adp.php?p_sid=i_4P6HDg&p_lva=&p_faqid=247&p_created=1022195687&p_sp=cF9zcmNoPTEmcF9ncmlkc29ydD0mcF9yb3dfY250PTIzJnBfc2VhcmNoX3RleHQ9JnBfcHJvZF9sdmwxPTQwJnBfcHJvZF9sdmwyPTUyJnBfcGFnZT0x&p_li=>.

be attracted to the company. *See Pittsburgh Press Co. v. Human Rel. Com.*, 413 U.S. 376 (1973) (advertisements for employment are commercial speech).

The misrepresentations alleged in this case are no less commercial in character because they were disseminated in promotional campaigns, public statements, and marketing, in addition to conventional advertisements. *See, e.g.*, FAC, ¶75, Pet. Lodging at 31. None of the commercial speech cases requires that speech be contained in a conventional advertising format for that speech to be reviewed under the commercial speech doctrine. Commercial speech may be disseminated through an informational pamphlet (*see Bolger,* 463 U.S. at 66) or an in-person sales presentation to small groups (*see Fox,* 492 U.S. at 472), while political messages may appear in a paid advertisement. *See Bolger*, 463 U.S. at 66 *citing New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964). The complaint pleads the existence of a publicity campaign, and in the world of modern advertising, an advertising message need not come packaged as an advertisement.

Marketing consultants advise companies to promote corporate image through press releases, press conferences, media alerts, press kits, bylined articles, meetings with newspaper editorial boards, one-on-one interviews with reporters, seminars, newsletters, and "Op-Ed." articles. S. SAUERHAFT & C. ATKINS, IMAGE WARS: PROTECTING YOUR COMPANY WHEN THERE'S NO PLACE TO HIDE 62, 76-95 (1989). Multi-faceted media "damage control" is advised to rebut accusations tarnishing corporate image: "Advertise your position through letters, paid ads, press releases, newsletters, letters to the editors, and calls to talk shows." GENASI, *supra*, at 141. The complaint in this case alleges this type of concerted and orchestrated public relations effort.

II. PRIVATE FALSE ADVERTISING ACTIONS FILED ON BEHALF OF THE GENERAL PUBLIC DO NOT THREATEN COMMERCIAL SPEECH

A. A Proper Respect For States And Their Judiciaries Requires That Any Challenge To Private False Advertising Suits As Chilling First Amendment Rights Should Have Been Raised First In California Courts

Nike, supported by the United States, claims for the first time that California violates the First Amendment by allowing private citizens to bring civil actions for equitable relief on behalf of the general public to redress false advertising violations. The gist of the argument is that a limitless number of "private attorney general" actions *could* be filed to challenge alleged false advertising because the state statute does not require that the plaintiff or the public be directly, measurably harmed by the violation or that the plaintiff demonstrate that the defendant acted with actual malice; the mere possibility that a case *could* be filed supposedly would deter even a commercial speaker from disseminating commercial messages. This argument was never pressed or passed upon by any California court: the sole issue presented to the California Supreme Court and Court of Appeal was whether Nike's alleged false factual statements constituted commercial speech. *Kasky*, 45 P.3d at 247-49.

This Court has long refused to consider any constitutional challenge "unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998); *see, e.g., Sprietsma v. Mercury Marine*, 123 S.Ct. 518, 522 n.4 (2002); *McGoldrick*

v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-35 (1940). Indeed, "this is a court of final review and not first view." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110-11 (2001). Sound reasons support this rule:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground.

Cardinale v. Louisiana, 394 U.S. 437, 438-39 (1969).

Nike's first-time facial constitutional challenge in this Court is particularly inappropriate because the California Attorney General was not presented with a proper opportunity to defend the law in the courts below. The states' attorneys general have obvious interest in defending the constitutionality of state laws. Respect for state sovereignty is reflected in federal policy ensuring that the states, through their attorneys general, have a full opportunity to appear in cases in which the constitutional validity of state law is assailed. *See* 28 U.S.C. § 2403(b). An eleventh-hour facial challenge in this Court, however, deprives the states' attorneys general of their ability, for example, to intervene in proceedings, establish a factual record supporting state law, or offer a construction of state law that would obviate constitutional challenge. Moreover, Nike apparently even ignored this Court's mandate that "the initial document filed in this Court shall recite that 28 U.S.C. § 2403(b) may apply and shall be served on the

Attorney General of that State" when the constitutionality of a state law is "drawn into question" and the state has not appeared as a party.[10] Sup. Ct. R. 29.4(c).

If Nike's facial constitutional challenge had been presented to the California courts, the state courts could have considered whether speech has been impermissibly chilled during the 70 years[11] in which injunctive relief and 30 years[12] in which restitution have been available to private parties in false advertising cases. Surely, Nike would have developed a record of the calamitous consequences of the private right of action – if there are any – rather than present merely doomsday speculation for the first time to this Court.

Moreover, if Nike had presented a meritorious argument, the California Supreme Court or Court of Appeal could have construed state law to avoid putative constitutional conflict. *See Kraus v. Trinity Management Services, Inc.*, 999 P.2d 718, 732 (Cal. 2000) (construing restitutionary provisions of unfair trade practice law to preclude fluid recovery, in part, to avoid potential due process concerns). The state appellate courts also could have considered the challenge to private party standing as part of Nike's *state*

[10] The California Attorney General was not served with the Petitioner's Brief at the same time as the parties (the document was received on March 10, 2003) and is unaware of any document filed with this Court that indicates the potential applicability of 28 U.S.C. § 2403(b). Under state law, every appeal affecting the application of the state's false advertising law must be served on the Attorney General. *See* Cal. Bus. & Prof. Code §§ 17209, 17536.5 (West 1997).

[11] Cal. Stats. 1933, ch. 953, § 1, at 2482 (amending former Cal. Civ. Code § 3369, the forerunner to current Cal. Bus. & Prof. Code § 17203, regarding unfair trade practices including false advertising).

[12] Cal. Stats. 1972, ch. 244, § 1, at 494, amending false advertising law.

constitutional arguments. The free speech clause of the California Constitution has long been interpreted to be "broader and more protective than the free speech clause of the First Amendment." *See, e.g., Los Angeles Alliance For Survival v. City of Los Angeles*, 993 P.2d 334, 342 (Cal. 2000). Consequently, if Nike had a meritorious argument, it might have been resolved on adequate state grounds.

B. Statutes Providing Remedial Actions To Prevent The Dissemination Of Deceptive Advertising Do Not Chill First Amendment Rights

1. False Advertising Law Is Not Subject To An Over Breadth Challenge

In its second question presented to this Court, Nike assumes that the California Supreme Court properly characterized Nike's speech as commercial speech and argues that, if so, "speakers" in general would be unduly chilled from engaging in commercial speech in derogation of the First Amendment. Pet. Br. i, 38 (asserting decision below imperils commercial entities throughout the world). Assuming as Nike does that this is a commercial speech matter, an over breadth challenge must founder: "it is irrelevant whether the ordinance has an overbroad scope encompassing protected commercial speech of other persons, because the over breadth doctrine does not apply to commercial speech." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 496-97 (1982) *citing Central Hudson*, 447 U.S. at 565, n.8.

2. The Challenged Statute Is A Reasonable Remedy For Addressing Deceptive Advertising By Commercial Enterprises

California, along with 43 other states and the District of Columbia, has adopted a version of the 1911 Printer's Ink model false advertising statute that prohibits any person from disseminating untrue or misleading statements which the person knows, or by the exercise of reasonable care should know, to be untrue or misleading, with the intent to dispose of property or services. Cal. Bus. & Prof. Code § 17500 (West 2003); Pet. App. at 87a-88a; *see People v. Superior Court*, 157 Cal.Rptr. 628, 634, n.7 (Cal. Ct. App. 1979). In addition, "unfair competition" is defined to include violations of Bus. & Prof. Code § 17500 and unfair, deceptive, untrue, or misleading advertising. Cal. Bus. & Prof. Code § 17200 (West 2003); Pet. App. at 83a. Although the advertising prong of the unfair competition definition appears broader than the false advertising prohibition of § 17500, both statutes have been interpreted to provide similar protection against false advertising. *See Committee on Children's Television*, 673 P.2d at 668 ("we discern no difference in the scope of these enactments . . . or the meaning of their provisions."). Both statutes have been construed to apply only to commercial speech and not to speech like political advertising that has been traditionally subject to core First Amendment protection. *See O'Connor v. Superior Court*, 223 Cal.Rptr. 357 (Cal. Ct. App. 1986).

Any person may bring an action on behalf of the general public to remedy false advertising violations. Cal. Bus. & Prof. Code §§ 17203, 17204, 17535 (West 1997); Pet. App. 83a-84a, 88a. A plaintiff's ability to bring an action for the general public is not conditioned on having suffered direct injury. The court, however, can dismiss the action if the "defendant can demonstrate a potential for

harm or show that the action is not one brought by a competent plaintiff for the benefit of injured parties. . . ." *Kraus*, 999 P.2d at 733. The creation of a role for a private attorney general "is not uncommon in modern legislative programs" to augment the limited resources of government agencies in implementing important legislative policy. *See Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972). Indeed, it has been long recognized as a matter of state practice that "A stated number of citizens or a single individual may be clothed by the Legislature with authority to invoke the aid of courts in the suppression of violations of law." *Barrows v. Farnum's Stage Lines, Inc.*, 150 N.E. 206, 208 (Mass. 1926).[13] Moreover, "experience demonstrates consumers are generally among the best vindicators of the public interest," and courts have allowed their participation as private attorneys general. *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1002-06 (D.C. Cir. 1966) (Burger, Circuit Judge [later Chief Justice]).

Although standing under the challenged advertising statute is broad, potential relief is narrow. The court "may" issue an injunction and "may make such orders . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such" violation. Cal. Bus. & Prof. Code §§ 17203, 17535. Neither injunctive nor restitutionary relief is required, and the trial court must permit the

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[13] Qui tam actions, in which a private party is authorized to pursue a penalty against the violator of a law although the party is personally unharmed by the violation, "have been in existence for hundreds of years in England, and in this country since the foundation of our Government." *Marvin* v. *Trout*, 199 U.S. 212, 225 (1905).

defendant to offer equitable considerations that must be considered in mitigating or declining discretionary equitable relief. *See Cortez v. Purolator Air Filtration Products Co.*, 999 P.2d 706, 717 (Cal. 2000).

A private plaintiff may not recover any damages for himself or anyone else. *See, e.g., Bank of the West v. Superior Court*, 833 P.2d 545, 557 (Cal. 1992); *Chern v. Bank of America*, 544 P.2d 1310, 1315 (Cal. 1976). Punitive damages are foreclosed. *See People v. Superior Court*, 507 P.2d 1400, 1402-03 (Cal. 1973). Civil penalties can only be recovered by designated public prosecutors. *See* Cal. Bus. & Prof. Code §§ 17206 (West 2003), 17536 (West 1997); Pet. App. 84a-85a. Other than restitution for the direct victims from whom money or property was taken, a private plaintiff cannot obtain the disgorgement of the profits or benefits the defendant obtained from false advertising. *See Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 2003 Lexis 1301, *5 (Cal. 2003); *Kraus*, 999 P.2d at 728, 732. Significantly, no statute provides for the award of attorney's fees in false advertising cases; thus, even a prevailing private plaintiff has no right to recover attorney's fees. *See Shadoan v. World Sav. & Loan Assn.*, 268 Cal.Rptr. 207, 212 n.7 (Cal. Ct. App. 1990). A court, however, may make a discretionary award of attorney's fees but only if the action resulted in the enforcement of an important right affecting the public interest, a significant benefit was conferred on the general public or a large class of persons, the necessity and financial burden of private enforcement make an award appropriate, and such fees should not in the interest of justice be paid out of any recovery. Cal. Code Civ. Proc. § 1021.5 (West 2003).

Moreover, California has established a procedure at the early stage of litigation to weed out baseless cases burdening free speech. A defendant may bring, within 60 days of service, a special motion to strike a complaint

arising from the defendant's constitutionally-protected speech. Cal. Code Civ. Proc. § 425.16(b)(1), (f) (West 2003). Protected speech activity includes commercial speech like advertising, marketing, and public relations. *DuPont Merck Pharmaceutical Co. v. Superior Court*, 92 Cal.Rptr.2d 755, 758-59 (Cal. Ct. App. 2000). The defendant need not establish that the action had the purpose or effect of chilling speech. *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 52 P.3d 685, 687 (Cal. 2002); *City of Cotati v. Cashman*, 52 P.3d 695 (Cal. 2002). All discovery proceedings are stayed until the motion is determined. Cal. Code Civ. Proc. § 425.16(g). The motion is considered on the basis of the pleadings and affidavits. *Id.* § 425.16(b)(2).

If the defendant establishes that the case arises from protected speech activity, the plaintiff must then establish the probability of prevailing. *Id.* § 425.16(b)(1); *Equilon,* 52 P.3d at 691, 694. The plaintiff must show that the "complaint both is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Navellier v. Sletten*, 52 P.3d 703, 712 (Cal. 2002).

A prevailing defendant is entitled to recover attorney's fees and costs, but a prevailing plaintiff is only entitled to recover those fees and costs if the special motion to strike is frivolous or brought for delay. Cal. Code Civ. Proc. § 425.16(c). Either party may pursue an interlocutory appeal of the trial court's decision, the effect of which is to stay proceedings until the appeal is determined. *Id.* §§ 425.16(j), 916(a). This statutory scheme thus "provides an efficient means of dispatching, early on in the lawsuit, and discouraging, insofar as fees may be shifted, a plaintiff's meritless claims." *Equilon*, 52 P.3d at 691. The California legal regime, thus, does not foster runaway

litigation creating any chilling effect on speech and, indeed, has significant limiting features.

3. Actions For Discretionary Equitable Relief Do Not Impermissibly Chill First Amendment Rights When They Are Directed To False Statements About The Defendant's Own Commercial Operations

Nike and the United States insist that this Court's defamation jurisprudence requires that privately-filed false advertising cases cannot constitutionally proceed without proof of both damage and actual malice or some other high level of scienter. They reason that without some tolerance for false advertising that does not meet these exacting standards, commercial speech may be chilled. This argument, however, is fundamentally inconsistent with the commercial speech doctrine.

This Court has long recognized that:

> there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'

Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); *accord Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to

be effected."). Accordingly, the false statement of fact "has never been protected for its own sake." *Va. State Bd. of Pharmacy*, 425 U.S. at 771.

Nonetheless, since "erroneous statement is inevitable in free debate," some false statements *about others* must be tolerated to promote free discussion; consequently, the courts have tempered the libel laws to permit a measure of falsity to ensure that "the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times*, 376 U.S. at 271-72. The level of tolerance varies depending on whether the defamed person is a public or private figure and whether the context is public or private. *See New York Times,* 376 U.S. at 279-80; *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Gertz*, 418 U.S. at 347, 349-50; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).

If Nike had defamed the labor practices of a competitor like Reebok or Adidas, the maligned competitor could bring an action for defamation under the rules described above. *See* 2 HARPER, JAMES & GRAY, THE LAW OF TORTS (2d ed. 1986), § 5.3, at 45 (a corporation may "maintain an action for defamation for language that tends to discredit it and to injure its business reputation."); *accord* Restatement (Second) of Torts § 561(a). Likewise, Nike's critics may be liable if they defamed Nike under the rules applicable to defamation actions.

The self-censorship issue at work in the libel cases has no bearing in the factual context pleaded in the case at bar. Erroneous statement is not inevitable when a company speaks of itself in promoting its products and corporate image or touting the conditions under which its products are manufactured. Noting the "commonsense" difference between commercial and noncommercial speech and distinguishing *New York Times*, this Court observed that:

> The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.

Va. State Bd. of Pharmacy, 425 U.S. at 772 n.24.

Emphasizing this point in his concurrence, Justice Stewart recognized that although some "breathing space" for free expression necessitated limitations on recovery for libel,

> The principles recognized in the libel decisions suggest that government may take broader action to protect the public from injury produced by false or deceptive price or product advertising than harm caused by defamation. In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. There is, therefore, little need to sanction 'some falsehood in order to protect speech that matters.' [*Gertz,* 418 U.S.] at 341.

Va. State Bd. of Pharmacy, 425 U.S. at 777-78 (Stewart, J., concurring).

The California Supreme Court's opinion follows this teaching. As the Court observed,

> In speaking to consumers about working conditions in the factories where its products are made, Nike engaged in speech that is particularly hardy or durable. Because Nike's purpose in making these statements, at least as alleged in the first amended complaint, was to maintain its sales and profits, regulation aimed at preventing false and actually or inherently misleading speech is unlikely to deter Nike from speaking truthfully or at all about the conditions in its factories.

Kasky, 45 P.3d at 258. Recognizing the importance to consumers of information about the circumstances in which products are manufactured, the *Kasky* court concluded that to the extent the false advertising laws caused Nike to increase its effort to verify the truth of its statements, state law served the purpose of commercial speech protection by "'insuring that the stream of commercial information flow[s] cleanly as well as freely.'" *Ibid.*, *citing Va. State Bd. of Pharmacy*, 425 U.S. at 772.

CONCLUSION

For the foregoing reasons, the California Supreme Court correctly concluded that the First Amendment does not protect a company's dissemination of allegedly false statements of objective, verifiable facts about the company's products and business operations as part of a publicity campaign intended to encourage consumption of its products. False commercial speech "may be prohibited entirely." *See In re RMJ*, 455 U.S. 191, 203 (1982) and

cases cited in Section I(C)(1), above. To facilitate the elimination of false commercial speech, the state may constitutionally permit private parties to seek limited equitable redress. Accordingly, the judgment should be affirmed.

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Respectfully submitted,

BILL LOCKYER
Attorney General of California
MANUEL MEDEIROS
State Solicitor General
RICHARD M. FRANK
Chief Assistant Attorney General
HERSCHEL T. ELKINS
Senior Assistant Attorney General
RONALD A. REITER
Supervising Deputy Attorney General
(*Counsel of Record*)

Counsel for Amici Curiae